

October 17, 1997

D.P.U. 97-96

Investigation by the Department of Public Utilities upon its own motion commencing a rulemaking pursuant to 220 C.M.R. §§ 2.00 et seq., revising standards of conduct governing the relationship between gas and electric distribution companies and their unregulated marketing affiliates, currently set forth at 220 C.M.R. §§ 12.00 et seq., to include all affiliates.

I. INTRODUCTION

The Department of Public Utilities is proposing to revise the regulations set forth at 220 C.M.R. § 12.00, which govern the relationships between electric and gas distribution companies and their unregulated marketing affiliates. The current regulations apply to "competitive affiliates" that engage in the "selling or marketing of natural gas, electricity, or related services on a competitive basis, including, but not limited to, natural gas or electric supply or capacity, and demand-side management." 220 C.M.R. § 12.02(2). The Department proposes to revise the definition of "competitive affiliate" to include affiliates engaged in non-energy related businesses. The Department seeks comments on this proposed revision, and on other issues related to 220 C.M.R. § 12.00.

II. BACKGROUND

During the rulemaking that resulted in the promulgation of 220 C.M.R. § 12.00, the Department sought comments on standards of conduct that would apply to all affiliates of electric and gas distribution companies engaged in "the selling or marketing of a product or service on a competitive basis," not just those affiliates engaged in the "selling or marketing of natural gas, electricity, or related services on a competitive basis." D.P.U. 96-44, Order to Consolidate, Solicitation of Written Comments, November 27, 1996, at 7, Attachment A. Ultimately, the Department determined that the standards of conduct should not apply to the relationships between gas and electric distribution companies and their affiliates engaged in non-energy related businesses, for the following reasons:

In making the determination to narrow the scope of these regulations, we note that the principal focus of the Department's restructuring efforts is to promote full and fair competition in energy supply markets. . . . Therefore, the Department's primary objective in undertaking this rulemaking was to foster competition where the potential for abuse of monopoly power most seriously threatens the emergence of a competitive market. . . . Although ratepayer subsidization of competitive non-energy related activities is also a concern for the Department, such markets currently enjoy a greater level of competition than do the markets for gas and electric supply and related activities. Moreover, there is insufficient information in the record of this proceeding for the Department to determine whether application of the Standards of Conduct to non-energy activities would impede the competitive affiliate's ability to compete on an equal footing in that market. The Department may reconsider this issue in the future should the Department receive complaints evidencing abuse of monopoly power in such markets. At that time, we will weigh the benefit of extending the standards of conduct to non-energy activities against the cost imposed upon the industry.

D.P.U. 96-44, at 7.

While cross-subsidization between the distribution company and competitive affiliates was not the principal focus of the Department's restructuring efforts, the Department did note the importance of the issue, and later discussed its authority to address those concerns:

While some commenters have suggested that the Department lacks sufficient authority or a compelling reason to apply these standards to "non-energy" related activities, such application is well within the Department's authority since the rules are directed at the distribution company and its transactions with affiliated entities. The Department possesses ample authority to review and prescribe a distribution company's relationship with its affiliate, particularly where such transactions may have ratemaking implications. G.L. c. 164 §§ 76A, 76C, 85, 85A, 94A, 94B, 94C; see Electric Industry Restructuring D.P.U. 95-30, at 40-43 (1995). Because cross-subsidization issues exist regardless of the type of competitive activity engaged in by the affiliate, and because cross-subsidization is of critical concern in the ratemaking process, the Department believes that application of the Standards of Conduct to non-energy related activities would be a valid exercise of the Department's jurisdiction.

D.P.U. 96-44, at 7, n.5.

The Department proposes that it may be appropriate and necessary to extend the standards of conduct to include affiliates engaged in non-energy related businesses. We make this

proposal based on the increasing convergence of the gas and electric industries with other non-energy-related industries such as telephone and cable. In Massachusetts, there are a number of examples of this convergence. For example, electric companies have invested in cable television (Boston Edison Company, D.P.U. 97-95) and telecommunications (NEES Communications) companies, and a gas company is in the process of acquiring an engineering consulting company (Bay State Gas Company, D.P.U. 97-24). This trend raises concerns regarding the possible inappropriate use of distribution company assets and resources on behalf of affiliated companies engaged in non-energy-related businesses, and also implicates the policy of "full and fair competition" in other industries subject to the jurisdiction of the Department or related agencies, such as telecommunications and cable television (Investigation by the Department of Public Utilities, on its own motion, into Boston Edison Company's Compliance with the Department's Order in D.P.U. 93-37, D.P.U. 97-95, at 3). Protecting ratepayer funds generally is one of the Department's most vital functions; therefore, it is important for the Department to act now to prevent inappropriate use of those funds by considering extending the standards of conduct to all affiliates of gas and electric distribution companies, regardless of the type of business engaged in by the affiliate.

III. PROPOSED REVISION TO REGULATIONS

The Department proposes several revisions to the current version of 220 C.M.R. §§ 12.00 et seq. The most significant is the revised definition of "competitive affiliate" set forth at 220 C.M.R. § 12.02(2). This definition has been revised to cover not only a gas or electric distribution company's competitive affiliates in energy-related fields, but all affiliated companies. The revised definition will bring dealings between a gas or electric distribution company and its

affiliated companies within the purview of the standards of conduct set forth in 220 C.M.R. § 12.03, and will prevent the improper cross-subsidization of affiliated companies by distribution companies. Other sections of the regulations have been revised as needed to accommodate this change in the definition of "competitive affiliate."

A copy of the current regulations showing these various proposed revisions is attached.

IV. SOLICITATION OF COMMENTS

The department seeks comments on the proposed revisions to 220 C.M.R. §§ 12.00 et seq. In addition, the Department seeks comments on other revisions to 220 C.M.R. §§ 12.00 et seq. that might be appropriate in order to protect ratepayers from improper use by gas or electric distribution companies of anything of value that was created in whole or in part with ratepayer funds.

The Department is interested in receiving comments on the following specific issues:

- (1) The need to extend the provisions of 220 C.M.R. §§ 12.00 et seq. to affiliates engaged in non-energy related businesses;
- (2) The scope of the Department's authority pursuant to G.L. c. 164, §§ 76A and 85 to extend the substantive provisions of 220 C.M.R. §§ 12.00 et seq. to affiliated companies engaged in non-energy related businesses (on a section-by-section basis, if possible);
- (3) The scope of the Department's authority pursuant to G.L. c. 164, §§ 76A and 85 to regulate any other transactions and dealings between electric and gas distribution companies and their affiliates engaged in non-energy related businesses;
- (4) Whether, in the application of 220 C.M.R. §§ 12.00 et seq., any distinction should be made between affiliated companies that are in other industries subject to regulation by the Department or another State agency and affiliated companies in unregulated industries and, if so, what specific distinctions should be made and under what circumstances;
- (5) Whether and under what circumstances transactions and dealings between an electric or gas distribution company and an affiliated company engaged in a non-energy related business could have implications for the competitiveness of the relevant non-energy

related market;

- (6) What specific provisions could or should be added to 220 C.M.R. §§ 12.00 et seq. to prevent improper cross-subsidization by gas or electric distribution companies of affiliated companies, regardless of the field in which the affiliated company does business;
- (7) Whether and under what circumstances the application of 220 C.M.R. §§ 12.00 et seq. to an affiliated company engaged in a non-energy related business might impede the affiliated company's ability to compete on an equal footing in its own market;
- (8) Whether, in the application of 220 C.M.R. §§ 12.00 et seq., any distinction should be made between transactions and dealings involving a gas or electric distribution company and its corporate parent and those involving a gas or electric distribution company and affiliated subsidiaries of the parent company and, if so, what specific distinctions should be made and under what circumstances;
- (9) Whether 220 C.M.R. § 12.03(9) should be revised to allow for the release of proprietary customer information with other than prior written authorization of the customer and, if so, what the conditions should be for such release.

The Department seeks written comments on these and any other issues related to the proposed revisions to 220 C.M.R. §§ 12.00 et seq. no later than 5:00 p.m. Friday, November 21, 1997.

To provide further opportunity for comment on these issues, and pursuant to G.L. c. 30A, §§ 2 and 4, and 220 C.M.R. § 2.05, the Department will commence public hearings on Monday, December 8, 1997, at 10:00 a.m., at the Department's offices, 100 Cambridge Street, 12th Floor, Boston, Massachusetts, 02202.

Final written comments may be submitted no later than 5:00 p.m. Friday, December 19, 1997.

All written comments should be filed with Mary L. Cottrell, Secretary, Department of Public Utilities, 100 Cambridge Street, 12th Floor, Boston, Massachusetts 02202.

By Order of the Department,

Janet Gail Besser, Acting Chair

John D. Patrone, Commissioner